Supreme Court, U.S.
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No. 86-1322

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

AAACON AUTO TRANSPORT, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBUS CIRCUIT

REPLY OF THE PETITIONER

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TABLE OF CONTENTS

	PAGE
Table of Cases & Authorities	i
Statutes	i
Brief	1

TABLE OF CASES AND AUTHORITIES

Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953)	1
Reserve Mining Co. v. Lord, 525 F.2d 1055 (1st Cir. 1981)	2
In Re Ruffalo, 390 U.S. 544 (1968)	7
United States v. Gregory, 369 F.2d 185 (D.C. Cir. 1966)	7

STATUTES

49 U.S. Code Section 11701(a)	9
49 U.S. Code Section 11701(c)	9

Related companies are listed in petitioner's Petition for Ceriorari

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REPLY MEMORANDUM OF PETITIONER

Petitioner AAACon Auto Transport, Inc. submits this Reply Brief in order to correct four of the errors in the memorandum submitted by respondents. The Commission's Reply Memorandum indicates that on the questions of gag orders and in the removal of a sitting judge, the Commission intends to continue the practices it utilized in the AAACon proceeding. It should not be permitted to do so.

Respondents mischaracterize Ramspeck v. Federal Trial Examiners Conference, 354 U.S.

128 (1953).

That case did not deal with the removal of a sitting administrative law judge against his will during the course of a proceeding. The Ramspeck decision concerned the employment rights of administrative law judges generally, and the Commission's authority to assign them to cases in the first instance. Research shows that this is the first case in which a sitting administrative law judge was removed from a proceeding against his will, without an affidavit or other evidence of wrongdoing being adduced, and where the tribunal did not first afford the judge an opportunity to comport his conduct of the case with the particular wishes of the tribunal. Cf. Reserve Mining v. Lord, 525 F.2d 181 (8th Cir. 1976).

The second error is that the respondents mislead, albeit unintentionally, in stating (Resp. Br. p. 10, no. 10) that for three years,

starting in 1978, petitioner was "totally free to contact any witness it wished and conducted an extensive discovery". That was true with regard to the proceedings conducted before Judge Benice up to 1980. However, after Judge Benice was removed in 1980, and was replaced with Judge Sarbacher, in 1981, the latter prohibited AAACon from contacting or interviewing any witness without his prior consent or that of the prosecuting attorney. Moreover, in the agency proceedings reactivated under Judge Sarbacher, practically all of the witnesses were new and different from those proposed in the 1978 proceeding. Accordingly, to those witnesses, petitioner AAACon Auto Transport, Inc. was allowed neither discovery nor any contact despite its repeated formal and informal requests to Judge Sarbacher therefor.

The agency gag order here on review is a more egregious interference with pretrial preparation by a defendant than that condemned by the D.C. Circuit Court of Appeals in United States v. Gregory, 369 F.2d 185 (D.C. Cir. 1966). In the Gregory case, the Court held that interference by government attorneys with informal investigative activities by counsel for a defendant constituted a denial of a fair trial. In the Gregory case, the prosecuting attorney had stated to witnessess that while they could speak with defense counsel, his advice was that they do so only in his presence. The Court noted that:

> Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them.

Here the defendant was denied

that opportunity which, not only the statute, but elemental fairness and due process required that he have. It is true that the prosecutor stated he did not instruct the witnesses not to talk to defense counsel. He did admit that he advised the witnesses not to talk to anyone unless he, the prosecutor, were present.

We accept the prosecutor's statement as to his advice to the witnesses as true. But we know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence. Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to. In fact, Canon 39 of the Canons of Professional Ethics makes explicit the propriety of such conduct: "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or

> criminal action without the consent of opposing counsel or party." Canon 10 of the Code of Trial Conduct of the American College of Trial Lawyers is an almost verbatim provision.
>
> * * *
>
> It is not suggested here that there was any direct suppression of evidence. But there was, unquestionably, a suppression of the means by which the defense could obtain evidence. The defense could not know what the eye witnesses to the events in the suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview.
>
> In our judgment the prosecutor's advice to these eye witnesses frustrated that effort and denied appellant a fair trial. Id. at 188, 189.

The reasoning in Gregory, supra, is equally applicable to the quasi-criminal proceeding involving the revocation of AAACon's certificate. In Re Ruffalo, 390 U.S. 544 (1968). The rationale of Gregory applies most

strongly to a ban on any contact or interview by AAACon's counsel with all proposed public witnesses.

Respondents concede that AAACon was denied any opportunity to interview the "eye witnesses." AAACon was denied a fair trial.

The third error in the Commission's reply occurs at pages 2 and 9, where the Commission mistates that the 1976 cease and desist order of the Commission provided notice that all of petitioner's certificates would be subject to revocation in the agency proceeding. What the Commission has quoted is not the 1976 cease and desist order of the Commission (which specifically states only that petitioners Sub. No. 1 certificate might be revoked for furture violations). Rather, the respondents have quoted a 1973 proposed order of a

hearing examiner, the language of which was superseded by the terms of the final order of the Commission in 1976.

Accordingly, petitioner never received notice, in the order commencing the 1978 proceeding, at any time prior to that proceeding or at any time during the course of the proceeding that any of its certificates other than the Sub. No. 1 certificate might be suspended or revoked. The notices and evidence only concerned the Sub. No. 1 certificate. Moreover, the prosecuting attorney's remarks during the proceeding indicated that operations by petitioner under its other certificates were not in issue. The prosecution and the Commission had every opportunity to amend the notice of proceeding (which was limited to possible revocation of the Sub No. 1 certificate). They never did so.

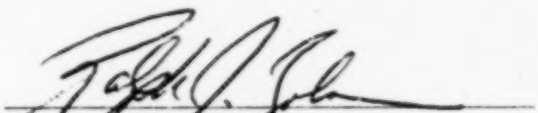
The Commission's argument that the

evidence applied to all of AAACon's operations is incorrect. For example, no evidence concerning petitioner's trucking operations under its Sub 8X certificate was adduced.

Finally, the Commission argues that 49 U.S. Code Section 11701(a) is not applicable to the proceeding conducted by the Commission because the revocation proceeding was not an investigative proceeding thereunder. This is a labored attempt to resurrect an argument rejected by the Court of Appeals below. The question before this Court is whether the time limits of 49 U.S. Code Section 11701(c) are applicable to agency proceedings underway at the time of its enactment. The answer is that the three year automatic cut-off provision was applicable under the established rules of statutory construction, heretofore

discussed. The applicability of the automatic cut-off legislation to on-going proceedings is also supported by the fact that Congress rejected the request of Chairman Gaskins of the Commission for a savings clause to insulate on-going proceedings from the operation of the cut-off rule.

For the foregoing reasons it is respectfully requested that this Court grant the Petition for a Writ of Certiorari.



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